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No. 82961-6

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SUPREME COURT OF THE STATE OF WASHINGTON

SCHOOL DISTRICTS' ALLIANCE FOR ADEQUATE FUNDING OF
SPECIAL EDUCATION; et al.,

Petitioners,

v.

THE STATE OF WASHINGTON; et al.,

Respondents.

**BRIEF OF AMICUS CURIAE
TACOMA SCHOOL DISTRICT NO. 10, ET AL.**

TACOMA SCHOOL DISTRICT NO. 10
Susan Scheurs, WSBA # 16191
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STATE OF WASHINGTON
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I. INTRODUCTION

The State of Washington does not adequately fund special education in violation of Washington Const., art. IX, § 1. The seventy-seven amicus curiae school districts (“Amicus Districts”) join together with the School Districts Alliance for Adequate Funding of Special Education (“Alliance”) and ask this Court to reverse the trial court and the Court of Appeals and to remand for new findings and conclusions consistent with the law and the facts that the Alliance proved.

The State’s underfunding of special education affects all Washington school children, regardless of whether they receive special education services. Special education services are part of the State’s constitutional obligation “to make ample provision for the education of all children residing within its borders.” Const. art. IX, § 1; *School Districts’ Alliance v. State of Washington*, 149 Wn. App. 241, 246, 202 P.3d 990 (2009); RCW 28A.155.010. The Washington Legislature in turn compels local school districts to fulfill the State’s obligation and to provide the special education services to qualified students. *E.g.* RCW 28A.155.020 and .050. Students and parents may enforce their right to these services through litigation. *E.g.* RCW 28A.155.080. The State’s failure to fully support special education costs has forced the Amicus Districts to use their special excess levy money to fill the gap. Districts seek and receive this levy money for enhanced services for all students, both those who receive special education services and those who do not. Levy money is intended

to provide the "extras" that our local communities expect us to provide for their children as part of a quality education. Instead, the State's failure to meet its paramount duty compels school districts to pay for the basics that are the State's sole obligation. This reduces or eliminates other school programs and activities that benefit all students, including both those who do and do not receive special education services. Any school funding system that requires districts to use local levy funding to meet the State's ample funding obligation violates Const. art. IX, § 1. *Seattle School Dist. v. State of Washington*, 90 Wn.2d 476, 585 P.2d 71 (1978). The present system violates the Constitution.

The Amicus Districts, therefore, join with the Alliance to urge the Court to reverse the trial court and to remand for entry of new findings and conclusions consistent with the law and the evidence.

II. IDENTITY AND INTEREST OF THE AMICUS DISTRICTS

The Amicus Districts are seventy-seven local school districts whose special education programs the State does not amply fund. Though different in total student populations, geographic location, and in the types of communities served, the law applies equally to each of the Amicus Districts, since each must provide appropriate special education services to qualified students. These services cost more than the amount of funding that the State provides. The Amicus Districts are Tacoma School District No. 10, Aberdeen School District No. 5, Anacortes School District No. 103, Arlington School District No. 16, Asotin-Anatone School

District No. 420, Bainbridge Island School District No. 303, Battle
Ground School District No. 119, Blaine School District No. 503, Central
Kitsap School District No. 401, Central Valley School District No. 356,
Centralia School District No. 401, Cheney School District No. 360,
Clarkston School District No. J250-185, Concrete School District No. 11,
Deer Park School District No. 414, Dieringer School District No. 343,
Eastmont School District No. 206, Entiat School District No. 127,
Evergreen School District No. 114, Ferndale School District No. 502, Fife
School District No. 417, Granite Falls School District No. 332,
Highline School District No. 401, Kent School District No. 415, Lake
Chelan School District No. 129, Lake Stevens School District No. 4,
Lakewood School District No. 306, Liberty School District No. 362,
Lynden School District No. 504, Mary M. Knight School District No. 311,
Marysville School District No. 25, Mead School District No. 354,
Meridian School District No. 505, Monroe School District No. 103,
Montesano School District No. 66, Moses Lake School District No. 161,
Mount Baker School District No. 507, Mount Vernon School District
No. 320, Nine Mile Falls School District No. 325, Nooksack Valley
School District No. 506, North Kitsap School District No. 400, North
Thurston School District No. 3, Oak Harbor School District No. 201,
Orcas Island School District No. 137, Orting School District No. 344, Port
Angeles School District No. 121, Prescott School District No. 402-37,
Raymond School District No. 116, Republic School District No. 309,
Ridgefield School District No. 122, Riverview School District No. 407,

Rosalia School District No. 320, San Juan Island School District No. 149, Seattle School District No. 1, Sedro-Woolley School District No. 101, Shelton School District No. 309, Shoreline School District No. 412, Skykomish School District No. 404, South Kitsap School District No. 402, South Whidbey School District No. 206, Steilacoom Historical School District No. 1, Sultan School District No. 311, Taholah School District No. 77, Tahoma School District No. 409, Toledo School District No. 237, Toppenish School District No. 202, Tukwila School District No. 406, Tumwater School District No. 33, Union Gap School District No. 2, University Place School District No. 83, Vancouver School District No. 37, Waitsburg School District No. 401-100, Washougal School District No. 112-6, White River School District No. 416, Winlock School District No. 232, Yakima School District No. 7, and Yelm School District No. 2. The seventy-seven Amicus Districts and their individual interests are set out in Appendix A.

For the 2004-05 school year, one of the four school years at issue in the litigation, the Alliance proved that the State of Washington underfunded special education programs statewide by \$134 million.¹ Alliance App. Br., p. 20; Ex. 131a and 131b. The combined enrollment of

¹ The calculation of this underfunding amount admittedly does not consider the basic education funding for these students (or basic education expenses, a fact that the trial court and the Court of Appeals ignore). Whether proof of special education underfunding requires districts to prove they also spent their basic education dollars providing special education services is, of course, the issue at the core of this appeal.

the Amicus Districts and Alliance Districts in 2004-05 comprised 62 percent of the students receiving special education services in Washington State.²

III. ARGUMENT

A. The Trial Court's Linkage of Basic Education and Special Education Funding is Error.

Unlike basic education, special education begins as a Federal program, and its statutory basis in Washington ultimately derives from Federal law. "In accordance with part B of the federal individuals with disabilities education improvement act [20 U.S.C. § 1400 et seq.] and any other federal or state laws relating to the provision of special education services, the superintendent of public instruction shall require each school district in the state to insure an appropriate educational opportunity for all children with disabilities...." RCW 28A.155.020. Washington's special education regulations similarly begin with Federal law. "The state authority for this chapter is RCW 28A.155.090(7). ... Federal authority for this chapter is 20 U.S.C. Sec. 1400 et seq., the Individuals with Disabilities Education Act." WAC 392-172A-01000. Special education in Washington each year depends upon the input of Federal funding. In

² The State annually publishes special education enrollment and total student enrollment on its website: <http://www.k12.wa.us/safs/reports.asp> (see report 1220F for each district). The Court may take judicial notice of facts contained in published government records. ER 201; *McFerran v. Heroux*, 44 Wn.2d 631, 645, 269 P.2d 815 (1954); *Metropolitan Creditors Trust v. Pricewaterhousecoopers, LLP*, 463 F.Supp. 2d 1193, 1197 (E.D. Wash. 2006) ("Facts contained in public records are considered appropriate subjects of judicial notice").

the 2004-05 school year, the Federal government provided almost \$200,000,000 to Washington for special education. Ex. 91, pp. 002815-16 (excerpts at Appendix B).³ The Legislature has directed that Washington's laws and regulations, if in conflict with Federal law, are to yield so that Washington will remain eligible for this important Federal funding:

If any part of this act is found to be in conflict with federal requirements that are a prescribed condition to the allocation of federal funds to the state, the conflicting part of this act is inoperative solely to the extent of the conflict ... The rules under this act shall meet federal requirements that are a necessary condition to the receipt of federal funds by the state.

E.g., Chapter 180, Laws of 1994, § 10.

The decision of the trial court and the Court of Appeals to merge the separate funding sources for the separate basic education and special education programs was error. It has been the Legislature's practice for at least 30 years to fund "categorical" programs, including those with a Federal origin such as special education, separately from basic education. This Court in *Seattle School District* recognized this:

The State weighted pupil guarantee [the Basic Education allocation] does not include the excess cost allocation for special education programs, or funding for traffic safety education, pupil transportation, food services, and other categorical programs. Within these program appropriations, a built-in obligation exists for the expenditures specifically associated with the programs.

³ The Alliance included all of this Federal "flow-through" money in calculating the amount of State special education underfunding in this case. *E.g.*, Ex. 131b.

90 Wn.2d at 530-31. The Court's opinion was a near-verbatim quote from the trial court's unchallenged findings of fact that the State itself quoted in its briefing in *Seattle School District*:

However, the apportionment formula [basic education] does not include the categorical funds, such as the excess cost allocation for the special education program ... Within these program appropriations there is a built-in obligation for the expenditures specifically associated with these program areas.

Appendix C (Brief of Appellant, p. 13, citing with approval an unchallenged finding of fact).

Consistent with Const. art. VIII, § 4, the Legislature funds basic education with a specific appropriation in a specific amount, and it separately funds special education with a specific appropriation in a specific amount. School districts may not simply raid their basic education allocation to fund the gap in special education. Such a rule would merely move the shortfall from one program to another.

The Alliance has clearly set out the legal reasons why the decisions of the lower courts are wrong: (1) Const. art. VIII, § 4 does not permit raiding one legislative appropriation to fill a funding shortfall in another; and, (2) the trial court's own findings do not support its conclusions, because if the basic education allocation is indeed the average cost to provide the basic education that every student receives, then *ipso facto* there is nothing left over to pay for the funding gap in special education.

IV. CONCLUSION

The State may not compel school districts to use either their basic

education or local levy funding to remedy the fact that the State underfunds special education. This Court should reverse and remand to the trial court with directions to declare the special education funding system unconstitutional so that the Alliance, the Amicus Districts, and all of the other supporters of education in this State can work with the Governor and the Legislature to solve this funding problem.

DATED this 21st day of May, 2010.

TACOMA SCHOOL DISTRICT NO. 10

By *Susan Schreurs*
Susan Schreurs, WSBA # 16191
Attorney for Amicus Curiae

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STATE OF WASHINGTON

10 MAY 21 PM 3:25

BY RONALD R. CARPENT **CERTIFICATE OF SERVICE**

~~CLERK~~ The undersigned hereby certifies that on this 21st day of May,

2010, I caused a copy of the foregoing Brief of *Amici Curiae* in Support of

Appellants to be served via U.S. mail to the following:

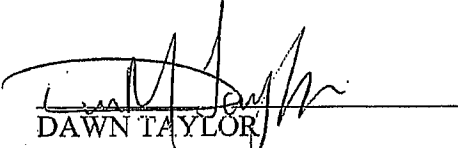
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I declare under penalty of perjury in accordance with the laws of
the State of Washington that the foregoing is true and correct.

DATED this 21st day of May, 2010, at Seattle, Washington.


DAWN TAYLOR

Appendix A

APPENDIX A

Profile of Amicus Districts

School District	County	Student FTE in 2004-05	Students in Special Education Programs in 2004-05	Underfunding in 2004-05 (F-196 Reports)
Aberdeen	Grays Harbor	3,727	558	\$ 515,228
Anacortes	Skagit	2,980	360	\$ 564,451
Arlington	Snohomish	5,240	700	\$ 600,171
Asotin-Anatone	Asotin	568	109	\$ 190,145
Bainbridge Island	Kitsap	4,044	551	\$ 1,295,716
Battle Ground	Clark	12,146	1,420	\$ 85,621
Blaine	Whatcom	2,143	254	\$ 165,177
Central Kitsap	Kitsap	12,354	1,811	\$ 1,760,414
Central Valley	Spokane	11,531	1,472	\$ 1,341,073
Centralia	Lewis	3,219	449	\$ 242,687
Cheney	Spokane	3,270	509	\$ 442,239
Clarkston	Asotin	2,656	450	\$ 136,789
Concrete	Skagit	758	126	\$ 83,138
Deer Park	Spokane	2,135	283	\$ 15,454
Dieringer	Pierce	1,135	81	\$ 273,592
Eastmont	Douglas	5,039	670	\$ 663,775
Entiat	Chelan	370	41	\$ 26,773
Evergreen (Clark)	Clark	23,509	3,039	\$ 3,284,187
Ferndale	Whatcom	5,094	677	\$ 700,107
Fife	Pierce	3,127	304	\$ 280,595
Granite Falls	Snohomish	2,311	379	\$ 78,857
Highline	King	16,623	2,148	\$ 3,465,617
Kent	King	26,040	3,044	\$ 2,126,024
Lake Chelan	Chelan	1,241	156	\$ -
Lake Stevens	Snohomish	7,171	928	\$ 921,114
Lakewood	Snohomish	2,423	330	\$ 214,629
Liberty	Spokane	504	71	\$ 64,583
Lynden	Whatcom	2,632	242	\$ 238,617
Mary M. Knight	Mason	200	20	\$ 1,087
Marysville	Snohomish	10,914	1,629	\$ 1,050,969
Mead	Spokane	8,595	954	\$ 1,008,428
Meridian	Whatcom	1,479	222	\$ 337,938
Monroe	Snohomish	6,234	733	\$ 628,833

School District	County	Student FTE in 2004-05	Students in Special Education Programs in 2004-05	Underfunding in 2004-05 (F-196 Reports)
Montesano	Grays Harbor	1,223	150	\$ 6,407
Moses Lake	Grant	6,480	884	\$ 1,895,940
Mount Baker	Whatcom	2,294	345	\$ 267,842
Mount Vernon	Skagit	5,488	847	\$ 1,435,501
Nine Mile Falls	Spokane	1,592	215	\$ 61,547
Nooksack Valley	Whatcom	1,684	271	\$ 270,305
North Kitsap	Kitsap	6,690	895	\$ 606,502
North Thurston	Thurston	12,460	1,699	\$ 3,822,743
Oak Harbor	Island	5,661	687	\$ 243,562
Orcas Island	San Juan	486	64	\$ 159,653
Orting	Pierce	1,924	296	\$ 327,562
Port Angeles	Clallam	4,485	764	\$ 879,420
Prescott	Walla Walla	242	38	\$ 28,723
Raymond	Pacific	533	94	\$ 72,002
Republic	Ferry	487	37	\$ -
Ridgefield	Clark	1,848	203	\$ -
Riverview	King	2,836	349	\$ 316,176
Rosalia	Whitman	236	19	\$ 62,025
San Juan Island	San Juan	947	106	\$ 23,300
Seattle	King	44,234	5,936	\$ 20,232,015
Sedro Woolley	Skagit	4,242	674	\$ 870,264
Shelton	Mason	3,962	597	\$ 366,817
Shoreline	King	9,502	1,309	\$ 2,294,722
Skykomish	King	70	18	\$ 74,597
South Kitsap	Kitsap	10,521	1,517	\$ 268,675
South Whidbey	Island	2,065	238	\$ 174,726
Steilacoom Historical	Pierce	2,101	311	\$ 116,208
Sultan	Snohomish	2,121	324	\$ 753,266
Tacoma	Pierce	29,541	4,377	\$ 5,594,113
Taholah	Grays Harbor	223	34	\$ 142,429
Tahoma	King	6,345	821	\$ 1,373,295
Toledo	Lewis	963	146	\$ 19,082
Toppenish	Yakima	3,133	374	\$ -
Tukwila	King	2,473	290	\$ 272,861
Tumwater	Thurston	5,921	775	\$ 657,407
Union Gap	Yakima	552	92	\$ 45,423
University Place	Pierce	5,126	626	\$ 353,651

School District	County	Student FTE in 2004-05	Students in Special Education Programs in 2004-05	Underfunding in 2004-05 (F-196 Reports)
Vancouver	Clark	21,174	2,756	\$ 123,172
Waitsburg	Walla Walla	351	52	\$ 37,186
Washougal	Clark	2,730	296	\$ 328,820
White River	Pierce	4,028	584	\$ 214,996
Winlock	Lewis	766	82	\$ 42,950
Yakima	Yakima	13,331	1,810	\$ 1,754,568
Yelm	Thurston	4,680	570	\$ 762,266

Appendix B

*Special Education
... a service, not a place.*

Twelfth Annual Report of Special Education Services in Washington State

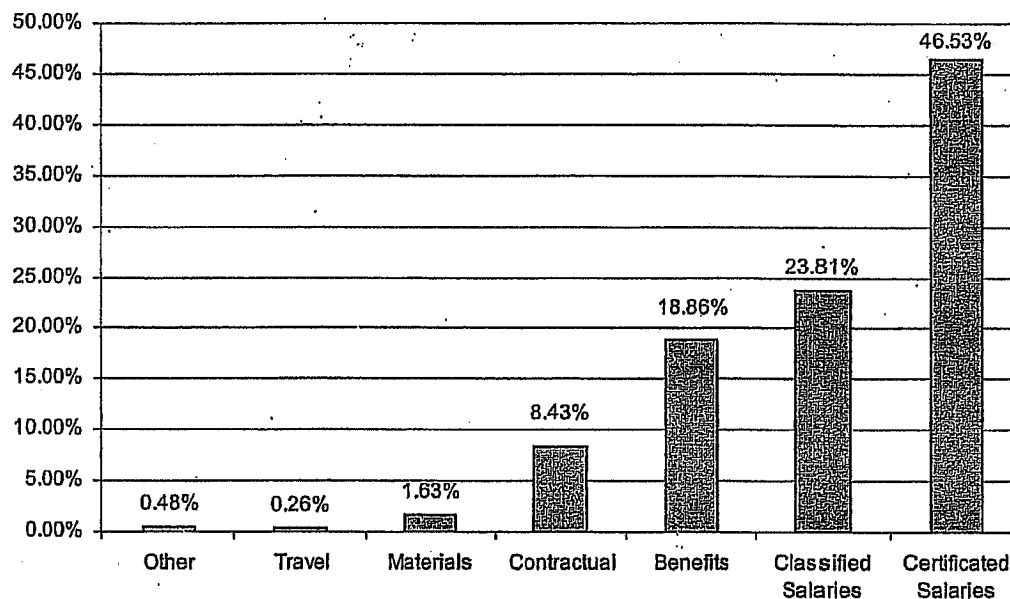


Dr. Terry Bergeson
State Superintendent of
Public Instruction

November 2005

Object expenditures are those associated with the major line items in a typical school budget. Approximately 89 percent of the expenditures are for district direct service personnel-related costs (certificated and classified salaries and benefits).

Figure 6
Distribution of Direct Expenditures for the
Eligible Special Education Students
by Object, 2003-04



Data Source: OSPI 2003-04 F-196 Annual Year-End Financial Statements.

The percentage of expenditures for activity and object items listed in Figures 5 and 6 are consistent of past school district spending practices. Most contractual services are also for personnel costs. A district may contract with other districts to provide special education and related services. Total personnel costs, including contractual expenditures, are a little over 97 percent of total direct expenditures.

IDEA-B Funds

For FY 2004-05, the state of Washington was awarded \$195,225,582 in IDEA funds based on the December 1, 2003, child count of 123,673 eligible special education students receiving special education and related services as defined in their individualized education programs.

These funds were allocated across three broad areas: flow-through, discretionary, and administration.

2004-05 LEA Flow-Through—Ninety percent of the IDEA-B state grant funds (\$177,151,761) was distributed to LEAs on a flow-through basis. The statewide average amount per eligible special education students (aged 3 through 21) receiving special education and related services as defined in their individualized education programs was \$1,432.

2004-05 Discretionary Projects—2003-04 discretionary amount plus 2.03% inflation, or \$5,693,893, was used for discretionary projects.

Discretionary funds are utilized by the state in support of direct service provision to its disabled population. Data are obtained to determine these needs by a variety of constituency groups as well as legislative mandates.

Categories of discretionary funding allocations include conferences, inclusion programs, institution mini-grants, state needs projects, and summer institutes.

2004-05 Administration—2003-04 administrative amount plus 2.03% inflation, or \$2,448,244, was used for state administrative costs.

The remainder of the monies were allocated to Safety Net grants totaling \$9,931,684.

IDEA-B Section 619 Funds

For FY 2004-05, the state of Washington was awarded \$8,299,793 in Section 619, IDEA-B funds. This amount was based on the December 1, 2003, child count of 18,010 eligible special education students (aged 3 through 5) receiving special education and related services as defined in their individualized education programs.

2004-05 LEA Flow-Through (619 Funds)—Eighty-five percent of the Section 619 state grant funds (\$7,077,431) was distributed to LEAs on a flow-through basis. The statewide average amount per eligible special education students (aged 3 through 5) receiving special education and related services as defined in their individualized education programs was \$544.

2004-05 Discretionary Projects—Monies allocated to Section 619 preschool discretionary projects was \$682,529.

The remainder of the monies were allocated to Safety Net grants totaling \$250,000.

Special Education Safety Net Funds

In 1995, the Washington State Legislature revised the state special education funding formula for eligible special education students. Engrossed Substitute House Bill (ESHB) 1410 (Sec. 508) stated: "In recognition of the need for increased flexibility at the local district level to facilitate the provision of appropriate education to children with disabilities and the need for substantive educational reform for a significant portion of the school population, the funding formula for special education is modified. These changes result from a 1994 study and recommendations by the Institute for Public Policy and the Legislative Budget Committee, aided by the Office of Superintendent of Public Instruction and the statewide task force for the development of special

Appendix C

NO. 44845

In The SUPREME COURT
Of The STATE OF WASHINGTON

SEATTLE SCHOOL DISTRICT NO. 1, ET AL.,

Respondents,

vs.

STATE OF WASHINGTON, ET AL.,

Appellants.

APPEAL FROM THE SUPERIOR COURT

FOR THURSTON COUNTY

THE HONORABLE ROBERT J. DORAN

BRIEF OF APPELLANTS

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OFFICE AND POST OFFICE ADDRESS:

Temple of Justice

Olympia, Washington 98504.

Phone: AC 206--753-6210

conviction that only by close attention to all of the relevant numbers can the true picture be ascertained.

Also, we shall, whenever possible, utilize verbatim the findings of fact entered by the trial court.

A. General Description of the Existing System

1. The General Apportionment Formula During the 1975-1977 Biennium

"The state apportionment formula is a method by which the state distributes the bulk of its general fund money to local school districts. (Brouillet, Vol. 2, pp. 126-127)" FF 639, CP 2964.

"However, the apportionment formula does not include the categorical funds, such as the excess cost allocation for the special education program, nor the funding for traffic safety education, pupil transportation, food services and other categorically funded state and federal programs. Within these program appropriations there is a built-in obligation for the expenditures specifically associated with these program areas. (Ex. 99 at 3)" FF 645, CP 2967.

"The apportionment formula operates on the premise of an "equal guarantee in dollars for each weighted student enrolled, based upon one full year of one hundred eighty days." (RCW 28A.41.130) This guarantee contains certain state and local dollars which will be described below. The Washington formula utilizes "weightings" or factors to increase the allocations to local school districts for

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Subject: RE: School District Alliance v. State of WA; Supreme Court Case No. 82961-6

Rec. 5-21-10

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Subject: School District Alliance v. State of WA; Supreme Court Case No. 82961-6

On behalf of Amici Curiae Tacoma School District No. 10, et al, attached please find the Motion to File Brief of Amici Curiae in Support of Appellants and the Brief of Amicus Curiae Tacoma School District No. 10, et al.

These document are being filed by Susan Scheurs of Tacoma School District No. 10, whose address is 601 South 8th Street, Tacoma, WA, 98401, WSBA# 16191. Susan's email address is listed above in the cc line.

Please do not hesitate to contact me if you have any questions regarding this matter.

<<motion.pdf>> <<brief.pdf>>

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